

APP. 19

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
Northwestern Corporation,
Debtor. Bankruptcy #03-12872 (CGC)

Wilmington, DE
August 20, 2004
2:30 p.m.

TRANSCRIPT OF EMERGENCY MOTION
BEFORE THE HONORABLE CHARLES G. CASE, II
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For The Debtor:

William E. Chipman, Jr., Esq.
Greenberg, Traurig, LLP
The Brandywine Bldg.
1000 West St.-Ste. 1540
Wilmington, DE 19801

Adam Cole, Esq.
Greenberg, Traurig, LLP
The Brandywine Bldg.
1000 West St.-Ste. 1540
Wilmington, DE 19801

Jesse Austin, Esq.
Paul Hastings Janofsky
& Walker, LLP
600 Peachtree St.-24th Fl.
Atlanta, GA 30308

Karol Denniston, Esq.
Paul Hastings Janofsky
& Walker, LLP
600 Peachtree St.-24th Fl.
Atlanta, GA 30308

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Donna L. Harris, Esq.
Cross & Simon, LLC
913 North Market St.-Ste. 1001
Wilmington, DE 19801

For The Official Creditor's: Eric Suttty, Esq.
Committee
The Bayard Firm
222 Delaware Ave.-Ste. 900
Wilmington, DE 19899

Alan W. Kornberg, Esq.
Paul Weiss Rifkind Wharton
& Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019

Mikhail Ratner, Esq.
Paul Weiss Rifkind Wharton
& Garrison, LLP
1285 Avenue of the Americas
New York, NY 10019

For Harbert Management: James Donnell, Esq.
Andrews Kurth, LLP
Ste. 200
600 Travis
Houston, TX 77002

Jennifer M. Gore, Esq.
Andrews Kurth, LLP
Ste. 200
600 Travis
Houston, TX 77002

For Touch America Creditors: Athanasios E. Agelakopoulos, Esq.
Committee
Young Conaway Stargatt
& Taylor, LLP
1000 West Street-17th Fl.
Wilmington, DE 19899

For Magten Asset Management: William J. Burnett, Esq.
Blank Rome, LLP
Chase Manhattan Centre
1201 Market Street-Ste. 800
Wilmington, DE 19801

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1 Gary Kaplan, Esq.
2 Fried Frank Harris Shriver
& Jacobson, LLP
3 One New York Plaza
New York, NY 10004

4 Bonnie Steingart, Esq.
5 Fried Frank Harris Shriver
& Jacobson, LLP
6 One New York Plaza
New York, NY 10004

7 William Burnett, Esq.
8 Fried Frank Harris Shriver
& Jacobson, LLP
9 One New York Plaza
New York, NY 10004

10 Meagan E. Costello, Esq.
11 Fried Frank Harris Shriver
& Jacobson, LLP
12 One New York Plaza
New York, NY 10004

13 For MBIA Insurance Corp.: George South, Esq.
14 King & Spalding, LLP
15 1185 Ave. of the Americas
New York, NY 10036

16 Stefanie Burbrower, Esq.
17 King & Spalding, LLP
1185 Ave. of the Americas
New York, NY 10036

18 For the State of Montana: Francis Monaco, Esq.
19 Monzack & Monaco, PA
20 400 Commerce Center
12th & Orange Sts.
Wilmington, DE 19899

21 For Montana Public Service: Al Brogan, Esq.
22 Commission
(Via telephone) State of Montana
Public Service Commission
23 1701 Prospect Ave.
Helena, MT 59620

24
25

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1		Richard W. Riley, Esq.
2		Duane Morris, LLP
3		1100 N. Market Street-Ste. 1200
4		Wilmington, DE 19801
5	For Richard Hylland:	John D. Demmy, Esq.
6		Stevens & Lee, PC
7		300 Delaware Ave.-Ste. 800
8		Wilmington, DE 19801
9	For RCG Carpathia Master	Eric Haber, Esq.
10	Fund	Kronish Lieb Weiner
11		& Hellman, LLP
12		1114 Avenue of the Americas
13		New York, NY 10036
14	For Credit Suisse First:	Jason C. DiBattista, Esq.
15	Boston	Morrison & Foerster, LLP
16		1290 Ave. of the Americas
17		New York, NY 10104
18		Kevin Gross, Esq.
19		Rosenthal Monhait Gross
20		& Goddess, PA
21		Ste. 1401
22		919 Market Street
23		Wilmington, DE 19899
24	For HSBC as Indentured:	Tina N. Moss, Esq.
25	Trustee	Pryor Cashman Sherman
		& Flynn, LLP
		410 Park Ave.
		New York, NY 10022
	For Wilmington Trust Co:	Philip Bentley, Esq.
		Kramer Levin Naftalis
		& Frankel, LLP
		919 Third Ave.
		New York, NY 10022
	For Law Debenture Trust:	John V. Snellings, Esq.
	Company of New York	Nixon Peabody, LLP
		100 Summer Street
		Boston, MA 02110
		Francis C. Morrissey, Esq.
		Nixon Peabody, LLP
		100 Summer Street
		Boston, MA 02110

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1 For Acting U.S. Trustee: Joseph J. McMahon, Jr., Esq.
2 (Roberta A. DeAngelis) U.S. Trustee's Office
3 844 King Street-Ste. 2313
4 Lock Box 35
5 Wilmington, DE 19801
6
7 Audio Operator: Stacy Pavese
8
9 Transcribing Firm: Writer's Cramp, Inc.
10 6 Norton Rd.
11 Monmouth Jct., NJ 08852
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1 (Proceedings in progress)

2 (Attorneys telephonically connected)

3 THE CLERK: -- 03-12872, Northwestern Corportion.

4 THE COURT: Good afternoon, I have an appearance list.
5 Are we ready to proceed?

6 MR. SNELLINGS: Your Honor, John Snellings of Nixon
7 Peabody for Law Debenture Trust Company of New York. We are
8 the moving party on our Motion to Adjourn the confirmation
9 hearing scheduled for next week the 25th.

10 THE COURT: All right. Go ahead, you may proceed.

11 MR. SNELLINGS: All right. I want to thank you for
12 taking the time to hear our Motion. We greatly appreciate it,
13 and I appreciate the fact that we have so many counsel on the
14 line in this, well, late afternoon on Eastern Standard Time.
15 When we gathered last week to hear our report from the Debtor
16 regarding the status of confirmation, it was disclosed that the
17 Debtor in the Toppers, if you recall, the Toppers and my client
18 the Quips, are two issuances that are in Class 8. But we heard
19 from the status report that the Debtor in the Toppers had
20 reached a settlement with regard to the objections to
21 confirmation that the Toppers and their representatives had.
22 The plan needed to be modified because Class 8 distribution was
23 going to increase from 2% of the common stock to 8% with a
24 possible additional 13% through the issuance of warrants. The
25 terms of the warrants were not disclosed at that time last week

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1 but nor were they finalized. Given the impact of this
2 modification and the fact that it had a impact on Class 7 and
3 Class 9, it was also disclosed that there'd have to be a
4 resolicitation before this plan could go, this second amended
5 plan could go to confirmation; however, it was disclosed that
6 this would be a perfunctory resolicitation because Harbert, the
7 largest holder of the Toppers would change their vote and
8 accept the plan, thus, Class 8, the only dissenting class after
9 the voting of the initial plan, would now accept the plan both
10 in number and amount. The Toppers make up approximately 82% of
11 Class 8, while the Quips represent about 18% of that class. It
12 was also finally disclosed that this new Plan Disclosure
13 Statement in a motion to set up procedures for the
14 resolicitation and any other related documents, would be filed
15 some time on Tuesday, August 17th. On this -- it goes without
16 saying that this new Class 8 treatment was a positive
17 development, moving from 8 -- 2% to 8% plus the warrants.
18 There is also, of course, open issues about the new treatment
19 that we, as representative of the Quips, had that needed to be
20 nailed down and fully appreciated before we could decide how we
21 might advise our clients to deal with this amendment. For
22 example, the strike price of the warrants had not been
23 determined. The term of the warrants. Would they be
24 transferable? Would they survive a sale of the company post-
25 confirmation? Fairly clear from news reports that there's a

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1 lot of interest in this company and so that's a real
2 possibility. So while this was a positive development in this
3 case, we also knew that there're a number of issues that still
4 needed to be addressed. Also, it -- this -- these amendments
5 aren't going to address the Trustee's primary concerns that
6 were detailed in our objection to confirmation that we had
7 filed earlier in the week. The fact that this amendment -- the
8 plan still had no provisions in which it dealt with the
9 adversary proceeding that Law Debenture and Magten has
10 presently in place against the Debtor with regard to the
11 fraudulent conveyance of the Montana Utility assets. There is
12 also issues that remain to the extent of whether the plan, in
13 any way, modified our property rights in the Montana Utility
14 assets. The classification with the Toppers, given our unique
15 interest in the fraudulent conveyance claim, as well as other
16 claims with regard to the plan such as the releases of third
17 parties, the director and officers treatment. So those issues
18 still remain; however, we did see it as a positive step and we
19 awaited for the amended plan. On August 16th, we had a
20 discussion with Debtor's counsel regarding the proposed new
21 treatment to get some more information so we could better
22 advise our client and have a better appreciation of the second
23 amended plan. During that conversation it was disclosed, for
24 the first time, that there were several twists in the
25 amendments that had not been disclosed during the Friday status

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1 conference. Essentially, those were three-fold: (1) that
2 Class 8 was now going to be split into Class 8(a) and that
3 included the Toppers and Class 8(b) which included the Quips.
4 Within Class B, while they were still sharing in this 8% of the
5 new stock and also 13% of additional warrants, that with regard
6 to Class B there would be remaining the death trap provision,
7 meaning that if the holders of the Quips in Class B did not
8 vote to support the plan, they would receive nothing under the
9 plan. Furthermore, a positive vote of -- for the plan, was a
10 waiver or dismissal of the adversary proceeding on the
11 fraudulent conveyance. These changes, while not disclosed in -
12 - on the Friday status conference, are significant changes. If
13 -- and we are -- had a grave concern that we had -- needed an
14 opportunity to start to address those and in a meaningful
15 fashion. And while the Debtor, as stated in a revised
16 Disclosure Statement, that the separation of the two groups
17 into subclasses A and B was in response to our objection to
18 confirmation that we shouldn't be classified with the Toppers
19 as well as that the death trap provision is an incentive for us
20 to vote for the plan. To the contrary we can -- they can only
21 be described as punitive with respect to our bringing of the
22 adversary proceeding and unnecessary, especially since with the
23 change of the Harbert vote, they had sufficient votes, both in
24 number and amount, to carry Class 8. Having not received the
25 amendment or any of its related documents on Tuesday or

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1 Wednesday, with confirmation hearing looming on August 25th, we
2 felt compelled to file this Motion for Adjournment. It is not
3 our intent to derail the confirmation process, but it is our
4 hope that with your intervention, that we will have a fair
5 opportunity to have a meaningful participation in this process.
6 We need time to analyze and appreciate this new treatment. The
7 appropriateness of the subclass structure, the appropriateness
8 of the death trap provision, we need to test the value of the
9 warrants. This will need some time to research and draft and
10 file a new objection to confirmation. None of those processes
11 are now indicated in any of the motions that have been filed by
12 the Debtor, and we believe for this to be a fair and
13 appropriate confirmation process, that we should be afforded
14 the appropriate time to be able to do that. We might also need
15 to take discovery of the Debtor with regard to these changes.
16 And we should be able to do this in a meaningful fashion and
17 not under the unnecessary pressure of being in the midst of a
18 confirmation hearing. The agenda that is circulated now for
19 the 25th states that as item number two, the confirmation of
20 the first amended plan, is going forward on the 25th. Item
21 number, I think, six is a Motion For Approval of the Disclosure
22 Statement for the second amended plan. It seems ridiculous to
23 move forward with a plan that they have recognized needs a
24 resolicitation of at least three different classes, when that
25 solicitation will not even have started prior to the

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1 commencement of the confirmation hearing. It breaks it up, it
2 makes it piecemeal and will only lead to confusion. And the
3 Debtor concedes that they cannot get everything done on the
4 25th so it begs the question, "Why even start?" Let's do this
5 in the fashion that is outlined in the Code as the process for
6 confirmation and -- in which the Disclosure Statement is
7 vetted, people have the -- an opportunity to object to
8 confirmation, the votes are solicited and gathered and then
9 confirmation begins. We are putting the proverbial horse
10 before the cart. And, like I said, we are not making this
11 Motion to derail this process. We know that this is a case
12 that is moving toward confirmation. You know, the train has
13 left the station with regard to that. We just don't want to
14 make sure that we're tied to the tracks without an opportunity
15 to be a meaningful participant in this process, and, therefore,
16 we ask that the August 25th hearing be adjourned and scheduled
17 later in September and that we schedule a time period for us to
18 do the work necessary to analyze this very significantly
19 amended second plan.

20 THE COURT: Well, before I hear from the Debtor or the
21 other parties, counsel, what is your -- what would your
22 proposed amount of delay be?

23 MR. SNELLINGS: Your Honor, I think that with regard
24 to filing objections to disclosures -- filing objections to
25 confirmation, I think we need a couple weeks to -- before we

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1 can finalize an objection to this plan as it now stands. I
2 mean, I think that we could be ready to go toward confirmation
3 by the end of September.

4 THE COURT: Well, a couple of weeks could be sooner
5 than that. I mean, today's the 20th or 21st, 20th, and a
6 couple of weeks would be the 9th, I believe. No, it would be
7 the 2nd from now. I mean, for example, well, a -- the question
8 is whether or not you want a couple of weeks from the existing
9 date of the 25th or you need a couple of weeks from now in
10 order to get ready for a hearing later on in September.

11 MR. SNELLINGS: Your Honor, I got about four inches of
12 documents here with regard to the Disclosure Statement and the
13 amended plan. Right now, the Disclosure Statement in which, I
14 believe, the Court has to move on to find its adequacy. I
15 think we'll have an opportunity, first, to address any issues
16 we have with the Disclosure Statement. That's right now set up
17 for the 25th. And so I think, first, we have to get that out
18 of the way, and then I would suggest that we have after that,
19 while the solicitation process is going on, we have three weeks
20 to draft a new objection to confirmation.

21 THE COURT: All right. Who wants to respond on behalf
22 of the Debtor first?

23 MR. AUSTIN: Jesse Austin will respond on behalf of
24 the Debtor, Your Honor.

25 MR. KAPLAN: Your Honor, since Magten filed a joinder

1 may we be heard before the Debtor --

2 THE COURT: I'm sorry. I can't hear.

3 MR. KAPLAN: Your Honor, since Magten filed a joinder,
4 could we be heard before the Debtor responds?

5 THE COURT: All right. Just make sure you identify
6 yourself for the record.

7 MR. KAPLAN: Sure, Your Honor. It's Gary Kaplan from
8 Fried Frank. Your Honor, first just to address the timing
9 issue, as I understand the Debtor's papers, they are seeking to
10 continue the confirmation hearing late in September. They are
11 picking a date around September 23rd. So what the Debtor was
12 proposing, as I understand it, is to begin the hearing on
13 August 25th and then to have nearly a month adjournment while
14 the solicitation goes on and then to finish the hearing. So
15 when Mr. Snellings asked for a few weeks to respond and then to
16 have a hearing, I think the timing that he is proposing is
17 consistent with what the Debtors are doing other than the fact
18 that, for some reason, they want to start on the 25th. And,
19 Your Honor, the Debtor is seeking relief that's not only
20 unorthodoxed, but there really is no basis in the Code or the
21 rules and it provides no benefits to the estate. I've been
22 struggling, along with some others, trying to understand what
23 benefit there is starting the hearing, then having the
24 solicitation and then coming back to the Court nearly a month
25 later and asking the Court to then rule on it. There have been

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1 absolutely no facts set forth that would justify such a
2 departure from the process that's outlined in the Bankruptcy
3 Code in the Bankruptcy Rules. In every case you could always
4 say, once we're already having a Disclosure Statement hearing,
5 well, let's start the confirmation hearing today, let's provide
6 evidence and, you know what, then we'll solicit, then we'll all
7 come back in a month and if everything's resolved, we'll go
8 forward. If not, we'll finish our hearing then. As the
9 Debtors acknowledge in their own papers and their Memo of Law,
10 they acknowledge that to the extent that Class -- that both
11 Classes 8(a) and 8(b) ultimately accept the plan, the Debtors
12 will, and I'm quoting from them, "minimize the expense of a
13 contested and possibly protracted confirmation process."
14 Because they concede both classes' acceptance will minimize
15 cost and expense to all parties and minimize the amount of
16 judicial involvement, why begin now before we even know whether
17 or not those classes will accept or not? It doesn't make any
18 sense.

19 THE COURT: Is the idea now, if I understand, that the
20 Class A and Class B -- excuse me -- Class 8(a) and Class 8(b),
21 8(a) being the Toppers and 8(b) being the Quips, that those
22 will be solicited separately and then counted separately for
23 purposes of acceptance?

24 MR. AUSTIN: Yes. Your Honor, it's Jesse Austin on
25 behalf of the Debtor. That is correct. There are two separate

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1 classes at this point.

2 THE COURT: Okay.

3 MR. AUSTIN: And I'll address that in a minute.

4 MR. KAPLAN: And, Your Honor, as Mr. Snellings said,
5 the holders of the Quips need time to understand whether or not
6 to pursue an objection. Right now we're being told, "You have
7 three days. Make up your mind." So, therefore, with
8 insufficient information in order to preserve our rights, it,
9 in essence, forces us to object and then to have a lengthy and
10 protracted confirmation. Who knows what's going to happen over
11 the next month? If you had looked a month ago, you would have
12 assumed that Harbert was going to be a very difficult part of
13 confirmation and that we were going to have to be dealing with
14 a long hearing just on Harbert's issues. Well, when the Debtor
15 started talking to Harbert, they were able to resolve those
16 issues and those issues went away. What the Debtors are
17 seeking now is to avoid any discussions with any party, to
18 start a confirmation hearing without giving any party the
19 opportunity to fully analyze the plan to determine what they
20 want to do. And what they're essentially doing, Your Honor, is
21 trying to ambush the holders of the Quips, separately classify
22 them at the last minute and force this plan down their throat.

23 THE COURT: So just again so I understand, because I'm
24 not sure I had a full understanding of this based upon the
25 conversations of the other day. The changes in the treatment

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1 with regard to Class 8, including Class 8(a) and Class 8(b),
2 the increase of the equity portion and the warrants are going
3 to be available both to 8(a) and 8(b) on a pro rata basis?

4 MR. SNELLINGS: That is correct, Your Honor.

5 THE COURT: So that the economic benefit of sweetening
6 the pot flows to both Quips and Toppers?

7 MR. SNELLINGS: That is correct, Your Honor.

8 THE COURT: And so the issue now is in this other
9 treatment with regard to the Quips that counsel is -- well, I'm
10 not saying that they've accepted the fact that it's now at a
11 level that satisfies the Quips, I'm not suggesting that. But,
12 at least, there is not a discrimination issue as far as the two
13 of them are concerned.

14 MR. AUSTIN: Well, Your Honor, that may or may not be
15 true because --

16 THE COURT: Well, I mean as far --

17 MR. AUSTIN: -- they have, they're -- the
18 classification is somewhat different and they do have some
19 portions of the treatment are different.

20 THE COURT: I understand that but I'm just -- purely
21 on the economic issue of their entitlement to the gross amount
22 of equity plus warrants that are being allocated to the
23 subordinated debt. That's being shared on a pro rata basis.

24 MR. AUSTIN: That's correct, Your Honor.

25 THE COURT: Okay. Mr. Austin, go ahead.

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1 MR. AUSTIN: Well, I -- Debtor obviously opposes any
2 request for a continuance. The treatment as the Court itself
3 has just honed in on, is identical, and all we're doing is
4 effectively improving, not reducing, but improving the recovery
5 to the Quips as well as with the Toppers on a pro rata basis as
6 the Court noted. The procedures which we are proposing to
7 follow are, indeed, what's outlined in the Code and that we are
8 simply presenting a modification that enhances the treatment of
9 subordinated Creditors which heretofore have already rejected
10 the plan. We have to, by law, resolicit at least to the Class
11 8 -- excuse me, the Class 7 because that's where the Sedina
12 Creditors gave up their recovery for purposes of helping to get
13 the plan confirmed, if you will, on a consensual basis. The
14 death trap of which Mr. Snelling refers to and complains, was
15 in the prior plan which the Quips understood and rejected when
16 they voted as a Class 8 Creditor to reject the plan. With
17 respect to the fact that we have subclassified, if you will,
18 the Toppers and the Quips, that is, indeed, what Wilmington
19 Trust and Magten asked for in their objections previously
20 filed. They said that they should not be separate -- they said
21 they should effectively be separately classified. So we gave
22 them what they asked for. And with respect to the issue
23 relative to the adversary case, all the Debtor is doing there
24 is confirming the Debtor's position that they only get one
25 recovery and they take it under the Quips. We believe there's

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1 no basis whatsoever, Your Honor, for delaying this confirmation
2 hearing.

3 THE COURT: Well, except --

4 MR. AUSTIN: I would ask, excuse --

5 THE COURT: -- except --

6 MR. AUSTIN: -- me, Your Honor.

7 THE COURT: -- except that -- except -- well, I mean,
8 the problem is, Mr. Austin, is that under no set of
9 circumstances are we going to be at a position on August 25th
10 to confirm the plan because the Second Amended Disclosure
11 Statement, which is the basis of the resolicitation, will not
12 have been approved under the best-case scenario until then.

13 MR. AUSTIN: That is correct, Your Honor. But the --
14 the law -- excuse me, the objections which they have raised are
15 not unique and they're not going to be any different
16 effectively from -- with the modification but with respect to
17 the Disclosure Statement, what we have done there with the
18 summary is simply described that we improve in the
19 distributions to the class of Creditors who are now trying to
20 oppose us from moving and get them actually that increased
21 distribution.

22 THE COURT: Although what they're saying, Mr. Austin,
23 well, at least what I hear them saying, is, "We don't know yet
24 whether we're going to oppose this plan with this new
25 distribution because we have not fully analyzed all of the

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1 bells and whistles and the numbers and so on to decide whether
2 or not, as opposed to fighting, this is something we want to
3 do." That's --

4 MR. AUSTIN: We understand that, Your Honor, but at
5 the end of the day, we will still have a fight whatever day it
6 is, whether it's with the Quips or not because we do have
7 equity holders who are raising the question of valuation. We
8 have to go through that battle under any circumstances and the
9 evidence which we really intend to present and would like to
10 present on the 25th goes effectively to the valuation questions
11 and the ability to meet the other 1129(a) test that are more
12 factual in nature. I would note that at least at this point,
13 the Quips have not raised any question about the valuation, the
14 overall valuation, of the Debtor under any circumstances. If
15 you look at the list of witnesses, they have not filed any list
16 of witnesses relative to experts on valuation and that does not
17 appear to be their issue. So the issues which we would propose
18 to present the evidence on next Wednesday which we, contrary to
19 what may have been said here today, we certainly anticipate
20 that all the fact-based evidence that is necessary for
21 confirmation of this plan, we can present next Wednesday such
22 that the only thing the Court would then have to evaluate
23 thereafter, is the question of the certification of the vote.
24 And that simply is a mechanical process we, unfortunately, have
25 to go through under the current circumstances because we have

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1 votes -- distributions that came out of the Class 7 and that,
2 you know, if we could, indeed, say that the change of votes by
3 the holders of the Class 7 would stand, which we certainly
4 believe they will, then we believe we're ultimately going to
5 have acceptance of both -- of Class 7, Class 8(a) and Class 9
6 all -- Class 7 and 9 have already accepted the plan, and as a
7 matter of law, unless they change their vote affirmatively,
8 their prior votes of yes continue and count for a yes vote for
9 the amended plan whatever else happens.

10 THE COURT: But --

11 MR. AUSTIN: The -- we think --

12 THE COURT: -- but part of the --

13 MR. AUSTIN: -- that procedurally, we are in good
14 stead and certainly request the Court to allow us to move
15 forward next week.

16 THE COURT: Well, part of the fact evidence that you
17 would have to present, though, in a contested confirmation,
18 would be the fact evidence supporting the cram down of 8(b) if
19 they, in fact, reject the plan.

20 MR. AUSTIN: I couldn't hear you exactly, Your Honor.

21 THE COURT: Well, isn't that right? I -- well, what I
22 said was, you said all the fact-based -- with -- I mean, you
23 know, for example 1129(a) stuff, I understand what you're
24 saying there. The valuation issue to flesh out the issue
25 between the equity and the Debtor, I understand that.

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1 MR. AUSTIN: But --

2 THE COURT: But if you have a -- if you end up with --
3 the other fact-based evidence you're going to have to have is
4 whatever's necessary to support the cram down, the 1129B
5 treatment of 8(b) or maybe, you know, I guess --

6 MR. AUSTIN: Yeah, but our perspective, Your Honor,
7 the issue -- the evidence we're going to present on that
8 point's not going to be any different from the evidence we're
9 going to present relative to the valuation that we have to
10 address with the equity holders so that the Court can proceed
11 on that front and if down the road Class 8(b) actually accepts
12 then it's a nonissue. You don't have to address it under any --
13 - in any event. But we certainly would ask this Court to deny
14 the Motion for a continuance to allow us to proceed, and we
15 have our witnesses ready and we certainly are prepared to move
16 forward. A delay certainly does, indeed, cost the Debtor money
17 because we are, hopefully, staying on track to possibly get out
18 by end of September, certainly early October and then, you
19 know, if we can, as the Court may have noticed on the docket
20 today, we filed -- I believe it was today, it may have been
21 yesterday, we have filed a Motion to approve incurring certain
22 fees and expenses in connection with exit financing which if we
23 can -- if and when we can complete that exit and engage in or
24 enter into that new financing, the Debtor's estimation is it
25 that it was going to reduce our interest carry by somewhere

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1 around 200, 300 basis points on a significant amount of debt.

2 THE COURT: Well, what about the issue of -- you've
3 also filed a Motion -- you filed a complaint against Magten.

4 MR. AUSTIN: Yes.

5 THE COURT: You've also filed a Motion to allow their
6 -- to estimate their claim.

7 MR. AUSTIN: Right.

8 THE COURT: Are you intending to do anything in
9 connection with any of that at the October -- at the August
10 25th hearing?

11 MR. AUSTIN: No, Your Honor. We don't -- we didn't --
12 not have to have that issue addressed at the confirmation
13 hearing.

14 THE COURT: Well, is there a way to deal with both of
15 these positions?

16 MR. AUSTIN: Well, we could certainly think there is,
17 Your Honor, because the fact that if we went forward and
18 presented our evidence in the process to the extent that the --
19 excuse me, Law Debenture and Magten still had legal basis by
20 which they had to -- wanted to oppose the confirmation, they
21 could -- you could set a date by which they could file their
22 briefs and post-confirmation briefs in that regard.

23 THE COURT: Well --

24 MR. AUSTIN: And that gives them the opportunity to
25 address, ultimately, the legal issues --

1 THE COURT: Well what I --

2 MR. AUSTIN: -- relative to this amended plan.

3 THE COURT: Well, I guess what I'm thinking about is
4 what about the 1129(a) issues plus the valuation issues with
5 the equity? What if that's what, as you suggested, that's what
6 it is you're going to address at the October -- excuse me, the
7 August 25th hearing?

8 MR. AUSTIN: Right. And we could address that here,
9 Your Honor, frankly, we could do that valuation question and
10 1129(a) points and if, at the end of the day, there are
11 evidentiary points which Magten and Law Debenture think are
12 important and feel serious about, you could reserve on those
13 issues and reschedule the hearing or continue the hearing as
14 we've asked in defense of bringing those points up when we get
15 to the point of the -- recertifying the vote.

16 THE COURT: Well, that's -- I guess that's what I was
17 suggesting.

18 MR. AUSTIN: Yeah, and that's --

19 THE COURT: I --

20 MR. AUSTIN: -- we'd be fine with that concept, too.

21 THE COURT: I understand that you have time, you have
22 witnesses ready, you want to go forward with the hearing, you
23 need to make a record, you want to address, particularly, the
24 questions with regard to the equity, that's important evidence.
25 I need to hear that and so on.

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1 MR. AUSTIN: And we have no problem if, from that
2 standpoint, you'd want to reserve on those Magten Law Debenture
3 issues and we'd come back at the date that you would set to
4 recertify the vote.

5 MS. STEINGART: All right. Speaking --

6 ? : Your Honor, this is --

7 MS. STEINGART: Your Honor, it's Bonnie Steingart. If
8 I might just --

9 MR. AUSTIN: Your Honor, I think Mr. Kaplan's already
10 spoken for Magten. I don't think it's appropriate --

11 THE COURT: Right.

12 MR. AUSTIN: -- to have two lawyers --

13 THE COURT: Well --

14 MR. AUSTIN: -- speak for one person at this --

15 THE COURT: Hold on.

16 MR AUSTIN: -- one entity.

17 MR. KORNBERG: Your Honor, it's Alan Kornberg for the
18 Committee and I would like to be heard in support of the
19 Debtor's position. If I might, Your Honor.

20 THE COURT: All right. Go ahead, Mr. Kornberg.

21 MR. KORNBERG: Your Honor, we do think it's important
22 to go forward next week. The experts that the principle of our
23 testimony that you're going to get in this case relates to the
24 valuation issue. In that regard, there're experts on all sides
25 that have filed their report, completed discovery and the like,

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1 and there is really absolutely no reason why that testimony
2 should not go forward next week. The treatment of the equity,
3 which is the party that has objected to the valuation
4 testimony, has not changed under the amended plan. The amended
5 plan still provides that the equity insurance receive nothing.
6 Those issues are fixed in all respects and, I think, it would
7 enormously inconvenience a lot of people who planned around the
8 August 25th date. And I think it -- there is no unfairness in
9 going forward on those issues.

10 THE COURT: Well, that --

11 MR. KORNBERG: With respect to the changes that have
12 been made, I do think that Magten and Law Debenture raised a
13 point that has some force, which is that to the extent that
14 they have objections based on the amended plan, they certainly
15 should be given an opportunity to raise those objections. But,
16 Your Honor, I would respond as follows. We have increased
17 treatment of the subordinated debtholders by giving them four
18 times the amount of equity originally promised under the plan
19 and, in addition, warrants for a significant portion of the
20 reorganized company. It doesn't take weeks to analyze those
21 changes. It takes hours or, perhaps, days. Though certainly
22 due process requires that they have an opportunity to address
23 those changes and file whatever supplemental objections they
24 may have, but I don't think it would take three weeks to do
25 that. Also, Your Honor, there is no bankruptcy rule that says

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1 that the confirmation hearing has to be conducted in
2 consecutive days. There is no reason why we couldn't start on
3 the 25th and then -- and dispense with the valuation testimony
4 and come back at a later date when we have the results of the
5 resolicitation and also address whatever supplemental
6 objections might have been raised by Magten and Law Debenture
7 at that time. So we think that the schedule can begin on the
8 25th and it can accommodate everybody's competing needs which
9 are the desire of the company and the Creditors' Committee to
10 keep this on track the greatest extent possible but also to
11 afford any fair opportunity for any additional objections to be
12 heard. As for the separate classification between 8(a) and
13 8(b), I would echo what Mr. Austin said. If Your Honor looked
14 at the Magten objection, almost half of it is devoted to a
15 description of why Magten has different legal rights and
16 interests from the Toppers and, quite frankly, the genesis of
17 that separate subclassification was really to dispense or to
18 meet and satisfy the objection raised by Magten. But as Your
19 Honor pointed out, the enhanced treatment is available to all
20 subordinated Creditors whether they're Toppers or Quips. So,
21 again, we would urge the Court to go forward on the 25th. We
22 all recognize we have to come back at a later day, we're all
23 prepared to do that and to dispense our supplemental objections
24 based on the planned amendment. There will be a full and fair
25 opportunity for those objections to be heard.

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1 THE COURT: All right. So Mr. Snellings? Are you
2 there? Mr. Snellings?

3 MR. SNELLINGS: Yes, Your Honor.

4 THE COURT: What about that? It seems to me that a
5 reasonable way to deal with this is to deal with the evidence
6 that needs to be addressed in any event and to give you an
7 opportunity to review and file supplemental objections. I'm
8 not sure you need as much time as you say. But to give you
9 that opportunity and then, in affect, to reserve those
10 objections to the time of what everybody agrees will have to be
11 a continued hearing. What's the matter with that?

12 MR. SNELLINGS: It's hard to speculate as to what
13 evidence is going to come in on the 25th and whether or not I
14 need to respond on the 25th to those issues or that everything
15 is reserved to some later date and, you know, there's a certain
16 importance of the continuity of examination and cross-
17 examination that I feel that there's a -- my Creditors are --
18 position and our presentation if we're sort of doing this in a
19 disjointed fashion.

20 THE COURT: Well, I must tell you, I can't guarantee
21 you you're not going to do it in a disjointed fashion, anyway.

22 MR. SNELLINGS: No, I understand that. I understand
23 the confirmation hearing can be put off, you know, from one day
24 to another and sometimes, you know, weeks intervene. What I'm
25 concerned about is the fact that we're going to start down this

1 road on confirmation prior to, you know, the final
2 solicitation, and I just do not think that that's an
3 appropriate way to conclude this case.

4 MR. AUSTIN: Your Honor, Debtor certainly will
5 volunteer and agree to bring back any witnesses that it
6 presents which any of the parties would ask us to bring back at
7 a subsequent hearing.

8 MR. KAPLAN: Your Honor, Gary Kaplan again. What the
9 Debtors are really asking for is have a confirmation hearing
10 before disclosure statement is approved and before vote is
11 taken. And I understand the convenience of the parties but
12 there is absolutely no basis to have it in that fashion and to
13 start taking evidence, and I understand that while people have
14 been preparing but, you know what, Your Honor? This was all in
15 the Debtor's control. They had this in their control. They
16 determined this was the way they wanted to go. They wanted to
17 fight and then at the end to deal with one party, maybe one day
18 they'll deal with other parties who have (indiscern.) But the
19 point is, having a procedure that's backwards and starting
20 confirmation before even a disclosure statement is approved,
21 (indiscern.) convenience.

22 MR. AUSTIN: Your Honor, with all due respect, the
23 disclosure statement has been approved. We are just --

24 THE COURT: Right.

25 MR. AUSTIN: -- supplementing it.

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1 MR. KAPLAN: And, Your Honor --

2 THE COURT: Right, I understand.

3 MR. KAPLAN: -- if I --

4 THE COURT: Let's not argue here. Here's what I'm
5 going to do.

6 MR. KAPLAN: Your Honor, if I could just finish. Is
7 that, you know, clearly we shouldn't have to object by
8 Wednesday, the same time it's objected at disclosure and
9 certainly we shouldn't have to cross-examine any witnesses and
10 we should have the right to -- that the Debtors could recall
11 all their witnesses to the extent necessary later in September,
12 which leads back to the point of how is this convenient for
13 people that have to sit through two hearings?

14 THE COURT: Well, you're going to have to sit through
15 two hearings anyway is the facts of the matter.

16 MR. KAPLAN: Yeah, but one could be a, perhaps, an
17 uncontested hearing where it's simply --

18 THE COURT: Well --

19 MR. KAPLAN: -- a matter of --

20 THE COURT: -- and one may be an uncontested hearing.

21 MR. AUSTIN: That's right, Your Honor.

22 THE COURT: One may end up --

23 MR. AUSTIN: Because if they vote --

24 THE COURT: -- being an uncontested --

25 MR. AUSTIN: -- ultimately, if they vote Class 8(b)

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1 votes for it, there's nothing that Mr. Kaplan needs to have us
2 bring any witnesses back for.

3 THE COURT: Right. Here's what I'm going to do. I
4 don't want -- we don't need to talk about this anymore. I'm
5 not going to vacate the hearing next week. I am going to
6 direct that the Debtor direct its evidence towards the 1129(a)
7 issues and towards the valuation issue. I'm going to allow a
8 cross-examination by all parties. I'm going to require the
9 Debtor to recall witnesses if requested by any of the objecting
10 parties or if we don't have enough time to finish, and I'm
11 going to give the parties in 8(b) whose treatment is being
12 changed, additional -- and who have not already consented to
13 the treatment, additional time to object. That additional time
14 to object will be, it seems to me, two weeks from today is
15 plenty. And then, we'll have that hearing, we'll -- it will
16 perhaps help shake out whether some of these issues -- I don't
17 think it is totally uncalled for or totally contrary to the
18 Code. We do have an approved disclosure statement. It is not
19 changing as regards to parties such as equity who have objected
20 and who will continue to object. And that's -- it's obvious
21 that the evaluation evidence also may have impact upon -- from
22 a cram down basis -- upon a dissenting junior class of
23 creditors, although there is nobody junior to them who's
24 receiving anything under the plan. So that may be a fight
25 without really a basis in law. So it seems to me it makes

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1 sense to deal with both of these concerns. I am sensitive to
2 the fact that we've set aside this time, parties have geared up
3 to do it. I'm also sensitive to the fact that certainly the
4 holders of the 8(b) claim should have a reasonable opportunity
5 to analyze and consider and that those issues are the ones that
6 can really be taken up along with the results of the
7 resolicitation at the later hearing. Now shall we set a later
8 hearing now or shall we wait until August and see how far we
9 get?

10 MR. AUSTIN: Your Honor, I think the Debtor would
11 request that we set that hearing next week so we see if there's
12 any discussions that may be had, I guess, between now and then.

13 THE COURT: So is that clear enough to everybody? In
14 other words, you do get to reserve -- the Movants here today
15 can have their issues reserved. They can cross-examine, but
16 they won't be limited by the cross-examination. The Debtor
17 will be obligated to bring back the witnesses before the cross-
18 examination. That may create some litigation advantage to the
19 Objectors but the Debtor would rather do it that way than have
20 the matter be put off and I think that's a reasonable judgment.
21 So I would rather, frankly, get the matter under way with
22 regard to what's going to be necessary evidence in any event
23 while, at the same time, considering the objections of the
24 holders of the Quips.

25 MR. SNELLINGS: (inaudible)

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1 THE COURT: I'm sorry?

2 MR. SNELLINGS: Your Honor, John Snellings. Just one
3 point of clarification. If we determine the need for some
4 discovery during that period, I would assume that that would be
5 permitted?

6 THE COURT: Well, we have a contested confirmation
7 hearing which is a contested matter to which the Discovery
8 Rules apply. So that's another reason, I think, it makes sense
9 to take up at the time of the hearing next week, when and where
10 we're going to set any continued hearing. We'll see, for
11 example, if there's issues with regard to the amended
12 disclosure statement that can't be resolved at that point.
13 That could have an impact upon what the resolicitation is. I'm
14 not anticipating that will happen, but it seems to me at the
15 end of that hearing, we'll have a much better idea how much
16 time, what kind of discovery is required, what the timing is
17 and so on. But I think you need to -- I'll set now a two-week
18 time period from now for the filing of any additional
19 objections. If you need to have that extended for any reason,
20 you can file a separate motion. Is that clear enough?

21 MR. SNELLINGS: Yes, Your Honor.

22 THE COURT: All right. I have entered today an Order
23 concerning the Motion to Dismiss with regard to the Magten
24 matter so that should be available on the ECF docket in
25 Delaware. Anything else? I have not yet entered the Order on

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1 the MOU. This week has turned out to be quite a bit more
2 difficult than I anticipated last week.

3 MR. AUSTIN: Your Honor, in respect to the MOU, since
4 we do have a confirmed deal with Harbert and Wilmington Trust
5 and we signed a term sheet to that affect yesterday, I can
6 advise the Court that in accordance with the terms of that term
7 sheet, Harbert and Wilmington trust will be withdrawing their
8 objections to that MOU. Probably they have -- I think they
9 have to file that withdrawal of their objections on Monday.

10 THE COURT: Right. I have reviewed the docket today
11 to see if, in fact, that withdrawal had been filed and I did
12 not see anything yet.

13 MR. AUSTIN: And we have a four -- we had a two-day --
14 two business days' requirement, and we didn't get the term
15 sheet executed fully until, probably, this morning, so -- but
16 they will be doing that in accordance with that term sheet.

17 MS. GORE: Your Honor, this is Jennifer Gore on behalf
18 of Harbert. That is correct. Wilmington Trust actually did
19 not file an objection so it is only Harbert and we have the two
20 business days.

21 MS. STEINGART: Right, but Magten still has an
22 objection to the MOU.

23 THE COURT: I understand.

24 MR. AUSTIN: That's correct.

25 THE COURT: I'm familiar with the Magten objection. I

1 was reviewing it today.

2 MR. AUSTIN: Oh, okay. Thank you, Your Honor.

3 THE COURT: Okay? All right, thank you.

4 ALL: Thank you.

5 THE COURT: We're adjourned. We'll see you next week.

6 (Court adjourned)

7
8 CERTIFICATION
9 I certify that the foregoing is a correct transcript from the
10 electronic sound recording of the proceedings in the above-
11 entitled matter.

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11 *Louis Parker*
Signature of Transcriber

02-9-04
Date